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FIRST GENERAL COUNSEL'S REPORT

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MUR: 6573

DATE COMPLAINT FILED: May 10, 2012

DATE OF NOTIFICATION: May 14, 2012

DATE OF LAST RESPONSE: June 15, 2012

DATE ACTIVATED: July 19, 2012

EXPIRATION OF SOL: February 1, 2017
to March 26, 2017

COMPLAINANT:

Republican Party of New Mexico

RESPONDENTS:

Independent Source PAC and Michael Corwin in
his official capacity as treasurer
Communications Workers of America

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(2)
2 U.S.C. § 431(17)
2 U.S.C. § 434(g)
2 U.S.C. § 441d
11 C.F.R. § 100.22
11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

OTHER AGENCIES CHECKED:

None

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I. INTRODUCTION

The Complaint in this matter, filed by the Republican Party of New Mexico ("RPNM"), alleges that the Independent Source PAC ("ISPAC"), an independent expenditure-only political committee, violated the Federal Election Campaign Act of 1971, as amended, (the "Act") by failing to timely and completely disclose on its 48-hour independent expenditure reports its spending on television advertisements critical of New Mexico Governor Susana Martinez. The Complaint also alleges that ISPAC failed to include complete disclaimers on the ads.

1 More broadly, the Complaint alleges that ISPAC's ads, although purportedly independent
2 expenditures in support of Barack Obama, were in fact intended to influence New Mexico state
3 politics. The Complaint alleges that ISPAC and the Communications Workers of America
4 ("CWA"), a labor organization that contributed \$190,000 to ISPAC, conspired to evade New
5 Mexico's \$5,000 limit on contributions to independent expenditure-only in-state PACs¹ and
6 "defraud" the Commission in violation of 18 U.S.C. §§ 371 and 1001, and requests that the
7 Commission refer this matter to the United States Department of Justice.

8 ISPAC acknowledges in its response that it made mistakes regarding its independent
9 expenditure reports and disclaimers but states that it is new to the federal process and is working
10 to rectify its mistakes. ISPAC Resp. at 1, 14-16 (May 28, 2012). ISPAC contends that its
11 advertisements at issue are federal independent expenditures because "[k]nocking Susana
12 Martinez out of running for VP provides a clear benefit to the re-election efforts of President
13 Obama and Vice President Biden." *Id.* at 8. ISPAC and CWA assert in their responses that the
14 Complaint's conspiracy allegation has no merit because New Mexico's \$5,000 contribution limit
15 to independent expenditure-only committees no longer applies in the wake of *Citizens United*
16 *v. FEC*, 130 S. Ct. 876 (2010) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).
17 Respondents also note that the RPNM itself succeeded as a plaintiff in federal court litigation in
18 securing an injunction against New Mexico's \$5,000 limit on contributions to independent
19 expenditure-only committees. *See Republican Party of New Mexico v. King*, 850 F. Supp. 2d
20 1206, 1215 (D.N.M. 2012); ISPAC Resp. at 3-7; CWA Resp. at 2 (June 15, 2012).

21 We conclude that ISPAC's ads do not expressly advocate the election or defeat of a
22 federal candidate and thus ISPAC was not required to disclose its spending on the ads on

¹ N.M. STAT. ANN. § 1-19-34.7(A).

1 independent expenditure reports. For that reason, we recommend that the Commission find no
2 reason to believe that ISPAC failed to timely and completely disclose the spending as
3 independent expenditures under 2 U.S.C. § 434(g). We further recommend that the Commission
4 dismiss, as a matter of prosecutorial discretion, the allegation that ISPAC failed to include proper
5 disclaimers as required by 2 U.S.C. § 441d and send a letter cautioning ISPAC about the
6 disclaimer requirements of the Act and Commission regulations.

7 In view of the apparent permissibility of CWA's contributions to ISPAC and the
8 Commission's lack of jurisdiction over New Mexico contribution limits, we make no
9 recommendations regarding the Complaint's conspiracy allegations. Instead, we recommend
10 that the Commission find no reason to believe that CWA violated the Act in this matter. Finally,
11 we recommend that the Commission close the file.

12 II. FACTUAL AND LEGAL ANALYSIS

13 A. Factual Summary

14 ISPAC aired the television advertisements at issue during February 2012. The Complaint
15 describes the ads as they appear on YouTube. Compl. at 2-3. ISPAC suggests in its response
16 that it revised the disclaimers on the ads prior to airing them on television. ISPAC Resp. at 2,
17 15-16. The ads are set forth below as they appear on YouTube:²

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19
20

² ISPAC states in its response that it aired four ads, not five as listed in the Complaint. ISPAC Resp. at 2, 16. The ads "Parents' Rights" and "Susana Martinez's Attack on Parents' Rights" are nearly identical but are set forth separately here.

ISPAC ad	Voiceover	Screen disclaimer
"Education Privatization" ³	Susana Martinez is trying to get rid of neighborhood schools by opening the door to out-of-state profit-making virtual schools. She is playing with our kids' future. Turning them into guinea pigs while sending our scarce educational dollars to enrich out-of-state corporations. New Mexico education dollars need to go our classrooms our teachers and our kids, not to making out-of-state corporations rich. Contact Susana Martinez and tell her you want a real education for your kids. Paid for by independent Source PAC.	www.independent sourcepac.org Paid for by Independent Source PAC. Not authorized by any candidate or committee.
"Parents' Rights" ⁴	Governor Susana Martinez wants to cut parents out of making decisions about their own child's education. She says parents' rights are "petty status quo." She says no to a compromise that protects parents' rights to choose if their child advances or stays behind. Should a state institution make important decisions about your child's future or should you? Contact Governor Martinez and tell her to stop interfering with your rights as parents. Paid for by Independent Source PAC.	www.independent sourcepac.org
"Susana Martinez's Attack on Parents' Rights" ⁵	Governor Susana Martinez wants to cut parents out of making decisions about their own child's education. She says parents' rights are "petty status quo." She refuses any compromise on mandatory retention. So parents will no longer be allowed to choose if their child advances or stays behind. Should a state institution make important decisions about your child's future or should you? Contact Governor Martinez and tell her to stop interfering with your rights as parents. Paid for by Independent Source PAC.	www.independent sourcepac.org
"Driver's License" ⁶	Why is Susanna Martinez making New Mexico a more dangerous place? Top law enforcement officials agree, the public is much safer when	www.independent sourcepac.org

³ <http://www.youtube.com/watch?v=kLFAV51oyzk&feature=youtu.be>.

⁴ <http://www.youtube.com/watch?v=UrW0u409d64&feature=youtu.be>.

⁵ <http://www.youtube.com/watch?v=NROkUPpMc6E&feature=youtu.be>.

⁶ <http://www.youtube.com/watch?v=3FdBIV7sqrM&feature=youtu.be>.

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	everyone has a driver's license. Martinez won't compromise to strengthen license regulations for undocumented workers. This means no to helping police find and arrest criminals, no to stopping hit and runs, and no to reducing fraud. She would rather force people into the shadows just to score political points. Susanna Martinez refuses to compromise and we all lose. Paid for by Independent Source PAC.	
"Dirty Downs Deal" ⁷	Susana Martinez is good to her friends, especially if they ante-up a lot of money to Susana PAC. She says she is against government corruption but that didn't stop her from manipulating the odds to benefit her pals at the Downs at Albuquerque. She got them a billion-dollar contract by muscling her way into the deal, stacking the deck with her cronies and playing it close to the vest by withholding information. Does this sound like a fair deal for New Mexico? For more information go to Independent Source PAC.	www.independentsourcepac.org Paid for by Independent Source PAC. Not authorized by any candidate or committee.

1
2 ISPAC disclosed spending a total of \$12,884.94 on February 29 and March 14, 2012, for these
3 advertisements on Schedule E, Itemized Independent Expenditures, in support of Barack Obama,
4 on its 2012 April Quarterly Report filed on April 12, 2012. ISPAC filed a 48-hour independent
5 expenditure report on April 11, 2012, disclosing \$6,442.47 it spent on television ads on
6 March 14, 2012. After the Commission's Reports Analysis Division sent an RFAI to ISPAC
7 dated May 17, 2012, regarding the PAC's apparent failure to file a timely and complete 48-hour
8 independent expenditure report, ISPAC filed an amended 48-hour independent expenditure
9 report on June 12, 2012, disclosing a total of \$12,884.94 that it spent on the television ads, an
10 amount that included the \$6,442.47 originally disclosed on ISPAC's initial April 11 independent
11 expenditure report.

12

⁷ <http://www.youtube.com/watch?v=MSF323axcws&feature=youtu.be>

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B. Legal Analysis

1. Independent Expenditure Reporting

The Act defines "independent expenditure" as an expenditure by a person expressly advocating the election or defeat of a clearly identified federal candidate that is not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate's authorized political committee, or their agents, or a political party committee or its agents. 2 U.S.C. § 431(17). The Act defines "candidate" as an individual who seeks nomination for election, or election, to federal office. 2 U.S.C. § 431(2). Under the Commission's regulations, a communication is "expressly advocating" when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)" 11 C.F.R. § 100.22(a); see *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986). The second part of this regulation encompasses a communication that, when taken as a whole and with limited reference to external events, "could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because" it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action." 11 C.F.R. § 100.22(b). A person, including a political committee, who makes independent expenditures aggregating \$10,000 or more at any time up to and including the 20th day before the date of an election shall file a report describing the expenditures within 48 hours. 2 U.S.C. § 434(g)(2)(A).

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1 ISPAC's advertisements, however, do not expressly advocate the election or defeat of a
2 candidate for federal office. In fact, the ads do not contain any reference to a clearly identified
3 federal candidate. The ads clearly identify New Mexico Governor Susana Martinez, but she is
4 not a candidate for federal office. The fact that Mitt Romney was reportedly considering her as a
5 possible choice for Vice President does not make her a candidate under 2 U.S.C. § 431(2).⁸
6 Accordingly, ISPAC was not required to disclose the costs of the ads as independent
7 expenditures, and its failure to do so is not a violation of the Act.⁹ Therefore, we recommend
8 that the Commission find no reason to believe that ISPAC violated 2 U.S.C. § 434(g).

9 2. Disclaimers

10 The Act requires that whenever a political committee makes a disbursement for the
11 purpose of financing any communication through any broadcasting station, such communication,
12 if not authorized by a federal candidate or candidate committee, shall clearly state that the
13 communication has been paid for by such political committee and that the communication is not
14 authorized by any candidate or candidate committee. 2 U.S.C. § 441d(a)(3); 11 C.F.R.
15 §§ 110.11(a)(1) and (b)(3). That statement must also include an audio statement that the political
16 committee is responsible for the content of the communication. The statement must be conveyed
17 by a full screen view of a representative of the political committee making the statement in

⁸ In Advisory Opinion 2006-30 (ActBlue), the Commission determined that ActBlue could solicit and receive contributions earmarked for clearly identified prospective candidates and postpone forwarding the contributions until a prospective candidate had become a candidate and registered a campaign committee. The opinion notes that prospective candidates would become "candidates" and have to report the contributions only when they registered a campaign committee or met the statutory threshold for candidates established in the Act and Commission regulations. In this matter, there is no suggestion that Governor Martinez took any step toward becoming a candidate for federal office.

⁹ Although ISPAC filed and subsequently amended 48-hour notices with the Commission concerning these advertisements, they were not obligated to do so.

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1 voice-over and must also appear in writing on the screen for at least four seconds. 2 U.S.C.

2 § 441d(d)(2); 11 C.F.R. § 110.11(c)(4).

3 ISPAC states in its response that its advertisements on education ("Parents' Rights" and
4 "Susana Martinez's Attacks on Parents' Rights") and public corruption ("Dirty Downs Deal")
5 "comply fully with the FEC requirements" ISPAC Resp. at 16. Without access to the ads
6 as aired, we cannot assess this claim. However, ISPAC acknowledges that its other
7 advertisements "may fall short of the written disclosures" and that "[i]t appears that in the rush to
8 get them on air that we did not go back and rework the paid by panel." *Id.* ISPAC's treasurer
9 Michael Corwin states that he accepts responsibility for the oversight. *Id.*

10 All five of ISPAC's advertisements as they appear on YouTube state that ISPAC paid for
11 the ads. None of the ads as they appear on YouTube, however, contain complete disclaimers as
12 required by the Act and Commission regulations. For example, none of the ads contain a full
13 screen view of an ISPAC representative stating that ISPAC is responsible for the content of the
14 ads. However, given that all of the ads contain identifying information, it appears that the public
15 would not have been confused or misled as to who paid for these ads. In addition, ISPAC's
16 disclosure reports include itemized disbursements for the ads at issue and the ads' total cost was
17 less than \$13,000. Under these circumstances, we recommend that the Commission dismiss, as a
18 matter of prosecutorial discretion, the allegation that ISPAC violated 2 U.S.C. § 441d and send a
19 letter cautioning ISPAC about the disclaimer requirements of the Act and Commission
20 regulations. *See Heckler v. Chaney*, 470 U.S. 821 (1985).

21 3. Communications Workers of America

22 The Complaint alleges that CWA conspired with ISPAC to evade New Mexico
23 contribution limits. Compl. at 1-2, 5. CWA asserts in its response that it could not have

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1 conspired with ISPAC to evade New Mexico contribution limits because, "as a constitutional
2 matter, there could be no enforceable amount limitation (or source restriction relevant to CWA)
3 on a contribution to a New Mexico-registered political committee that, like ISPAC, does not
4 itself contribute to New Mexico candidates, party committees or other New Mexico-registered
5 contributing state political committees." CWA Resp. at 2 (emphasis in original); *see Republican*
6 *Party of New Mexico v. King*, 850 F. Supp. 2d 1206, 1215 (D.N.M. 2012). In any event, the
7 Commission has no jurisdiction over New Mexico contribution limits. Accordingly, we
8 recommend that the Commission find no reason to believe that CWA violated the Act in this
9 matter. Finally, we recommend that the Commission close the file.

10 III. RECOMMENDATIONS

- 11 1. Find no reason to believe that Independent Source PAC and Michael Corwin in his
12 official capacity as treasurer violated 2 U.S.C. § 434(g);
13
- 14 2. Dismiss, as a matter of prosecutorial discretion, the allegation that Independent
15 Source PAC and Michael Corwin in his official capacity as treasurer violated
16 2 U.S.C. § 441d, and issue a letter of caution to these respondents;
17
- 18 3. Find no reason to believe that the Communications Workers of America violated the
19 Act in this matter;
20
- 21 4. Approve the attached Factual and Legal Analysis;
22
- 23 5. Close the file; and

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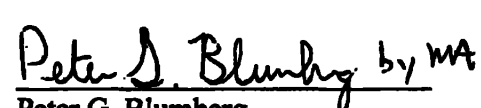
6. Approve the appropriate letters.

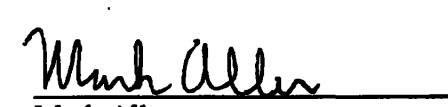
Anthony Herman
General Counsel

10-23-12
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